

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
JOYCE GAUGHAN	:	DETERMINATION
	:	DTA NO. 808196
for Revision of a Determination or for Refund	:	
of Sales and Use Taxes under Articles 28 and 29	:	
of the Tax Law for the Period March 1, 1984	:	
through November 30, 1986.	:	

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Petitioner, Joyce Gaughan, 14 Landfill Avenue, Monticello, New York 12701, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period March 1, 1984 through November 30, 1986.

A hearing was held before Jean Corigliano, Administrative Law Judge, at the offices of the Division of Tax Appeals, Two World Trade Center, New York, New York on February 4, 1991 at 1:15 P.M., with all briefs to be submitted by May 31, 1991. Petitioner submitted a brief on April 19, 1991. The Division of Taxation submitted a brief on May 17, 1991. Petitioner did not submit a reply brief. Petitioner appeared by James J. DeLuca, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Andrew S. Haber, Esq., of counsel).

ISSUE

Whether the sale of a building in conjunction with the sale of the assets of a defunct restaurant and tavern business constituted a "bulk sale", triggering the notice requirements of Tax Law § 1141(c).

FINDINGS OF FACT

In March 1987, petitioner, Joyce Gaughan, entered into an agreement to purchase real and tangible personal property and other assets from Anthony Cellini. The real property consisted of a parcel of land upon which was situated a three-story building. On the first floor of that building was a tavern and restaurant formerly operated by Mr. Cellini, called Roark's Tavern.

The terms of the purchase agreement executed by petitioner and Mr. Cellini included the "Sale of Real Property" and the "Conveyance of Assets of Roark's Tavern". Those assets were enumerated in the purchase agreement and included: furniture, fixtures and equipment; existing inventories of food, liquor and supplies; the exclusive right to use the name Roark's Tavern and any and all variances of that name; and the right to use the phone number 794-9742. In addition, the seller agreed not to engage in the business of owning or operating a restaurant or bar within Sullivan County for a period of five years. The purchase price was \$185,000.00, of which \$184,000.00 was allocated to the real property. The actual transfer of assets took place on June 17, 1987. Petitioner never notified the Division of Taxation ("Division") of this sale.

The Division began an audit of Anthony Cellini d/b/a Roark's Tavern early in 1987. At the time of the audit, the Division was informed that Roark's Tavern was no longer operating, and a visit to the premises by an auditor confirmed this fact. Since the last sales tax return filed by Mr. Cellini was for the quarter ended November 30, 1986, the Division concluded that Roark's Tavern was not operating after that date. As a result of the audit, the Division determined additional tax due from Mr. Cellini in the amount of \$12,838.57 plus penalty and interest. A notice of determination was issued to Mr. Cellini. In February or March 1988, a similar notice of determination was issued to Roarks of Monticello, Inc., a corporation which was then thought to be the purchaser of Roark's Tavern. The audit report indicates that the Division identified the purchaser by referencing the vendor registration number of the tavern's new operator, but this fact is not clearly established by the record. In December 1987, an auditor visited the premises of Roark's Tavern and found it being operated by petitioner and her son.

Following a conference with Mr. Cellini, the Division agreed to reduce the amount of tax due to \$8,331.13, plus penalty and interest.

In February 1989, a conciliation conference was held regarding the notice of determination issued to Roark's of Monticello, Inc. At that conference, the taxpayer established that the actual purchaser of the property owned by Mr. Cellini was Joyce Gaughan, the president

of Roark's of Monticello, Inc.; therefore, the Division cancelled the notice issued to the corporation.

The Division reviewed its records and determined that Ms. Gaughan had not notified the Division of her purchase of the assets of Mr. Cellini.

The Division issued to petitioner, Joyce Gaughan, a Notice of Determination and Demand for Payment of Sales and Use Taxes Due, dated March 2, 1989, for the period March 1, 1984 through November 30, 1986, assessing sales tax of \$8,331.13 plus penalty in the amount of \$2,291.37 and interest of \$4,462.72 for a total amount due of \$15,085.22.

Following a conference, the Division issued to petitioner a Conciliation Order dated March 9, 1990, upholding the determination of tax due but adjusting the penalty and interest as follows: "Penalty and interest assessed under section 1141(c), i.e., the seller's penalty and interest, have been cancelled. Penalty and interest, however, apply to the unpaid tax deficiency from the date of the determination on March 2, 1989 until full payment.

#### CONCLUSIONS OF LAW

A. Section 1141(c) of the Tax Law provides, in pertinent part:

"Whenever a person required to collect tax shall make a sale, transfer or assignment in bulk of any part or the whole of his business assets, otherwise than in the ordinary course of business, the purchaser, transferee or assignee shall at least ten days before taking possession of the subject of said sale...notify the tax commission by registered mail of the proposed sale...."

Whenever a purchaser fails to comply with the notice provisions of section 1141(c) that purchaser "shall be personally liable for the payment to the state of any such taxes theretofore or thereafter determined to be due to the state from the seller" (Tax Law § 1141[c]).

The purpose of section 1141(c) is to ensure that there exists a source of funds from which to satisfy the State's tax claims. By making the purchaser personally liable for the payment of taxes due from the seller, to the extent of the fair market value or purchase price of the assets sold, the State ensures that its interests will not be extinguished when the taxpayer transfers its business assets in bulk (see, Harcel Liquors v. Evsam Parking, 48 NY2d 503, 423 NYS2d 873, 875; Matter of Velez v. Division of Taxation, 152 AD2d 87, 547 NYS2d 444).

B. There is no question that the transaction between Mr. Cellini and petitioner would have been subject to the notice requirements of section 1141(c) if the tavern and restaurant had been operating at the time of the sale. Those requirements are triggered "[w]henever a person required to collect tax shall make a sale...in bulk of any part or whole of his business assets, otherwise than in the ordinary course of business". Although petitioner repeatedly asserted, by her representative, that there was no sale of business assets and that she purchased only real property, the evidence proves otherwise. The purchase contract executed in March 1987 contains separate provisions for the sale of real property and the "Conveyance of Assets of Roark's Tavern". Those assets included tangible personal property, including furniture, fixtures, equipment and inventory associated with the restaurant and bar, as well as certain intangible property, e.g., the exclusive right to use the name Roark's Tavern and a covenant not to compete. Since business assets of Roarke's Tavern were sold to petitioner by Mr. Cellini, this transaction must be considered a bulk sale (a sale that triggers the notification requirements of Tax Law § 1141[c]).

C. Petitioner argues that the transaction was not a bulk sale because Roarke's Tavern was not an operating business at the time of the sale. To accept this argument would defeat the purpose of the legislation. Moreover, the transaction between Mr. Cellini and petitioner is most accurately characterized as a bulk sale.

At the time of the sale, Mr. Cellini was "a person required to collect tax". A person required to collect tax includes "every vendor of tangible personal property or services" (Tax Law § 1131[1]). The term "vendor", as it is used in article 28, includes "[a] person making sales of tangible personal property or services, the receipts from which are taxed by [article 28]" (Tax Law § 1101[b][8][i][A]). Mr. Cellini sold petitioner tangible personal property the receipts from which were subject to sales tax. Thus, he was a person required to collect tax at the time of the sale. Furthermore, the record establishes that the sale of tangible personal property was not merely an incident to the sale of real property (as would be the case, for example, where a homeowner sells furniture and appliances as an incident to the sale of his

home). The purchase agreement is indisputable evidence that Mr. Cellini sold petitioner the assets of a business.

D. In accordance with Finding of Fact "7", the penalty and interest asserted by the notice of determination shall be calculated from March 2, 1989.

E. The petition of Joyce Gaughan is granted to the extent indicated in Conclusion of Law "D", and in all other respects the petition is denied.

DATED: Troy, New York  
August 29, 1991

/s/ Jean Corigliano  
ADMINISTRATIVE LAW JUDGE